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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4633-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BOBBIE T. SIMMONS, a/k/a
TYRAY,

Defendant-Appellant.

Submitted January 25, 2017 – Decided February 10, 2017

Before Judges Carroll and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County,
Indictment No. 13-04-1408.

Ronald B. Thompson, attorney for appellant.

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Nancy P. Scharff,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

The trial court denied defendant Bobbie Simmons' motion to
suppress evidence seized as the result of a warrantless search of
the automobile he was driving. The court found that defendant

freely and voluntarily consented to the search. Defendant thereafter pled guilty to an amended charge of second-degree possession with intent to distribute cocaine, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(1). He was sentenced to a seven-year term of imprisonment with thirty months of parole ineligibility. Defendant now appeals from the denial of his suppression motion. We affirm.

I.

The only witness at the suppression hearing was Trooper Anthony Nocito, a nine-year veteran of the New Jersey State Police. On November 25, 2012, Nocito conducted a motor vehicle stop after observing a black Audi, driven by defendant, speeding on the New Jersey Turnpike.¹ When Nocito approached the vehicle, he "immediately smelled the odor of raw marijuana as the window went down." Nocito called for assistance, and Troopers Blackburn and Salvato responded. Defendant initially denied there was marijuana in the car. Based upon the marijuana odor, defendant was placed under arrest, handcuffed, and seated in the front passenger seat of Nocito's patrol car.

Nocito then presented defendant with a "Consent to Search" form and read it aloud to him. Defendant granted verbal consent

¹ The vehicle was registered in defendant's mother's name.

to search the car, but did not sign the form because he was handcuffed. During the search, Trooper Blackburn stood near defendant so that he could withdraw his consent at any time. Nocito found cocaine in the engine compartment and showed it to defendant. He told defendant "I know there's something in the trunk, but I can't find it." Nocito advised that he "didn't want to rip apart his mom's car" and suggested defendant show him where the marijuana was located. With defendant's assistance, Nocito found the marijuana in the trunk battery compartment. Defendant denied the drugs were his and signed the "Consent to Search" form after he was transported to police headquarters for processing.

Judge John T. Kelley denied the suppression motion in a January 7, 2015 oral opinion. Referencing the dash cam video from Nocito's patrol car, the judge found:

The audio in the car showed that the defendant was presented with the consent-to-search form which was read to [defendant] who then consented to the search.

During the search, the trooper located substantial drugs thought . . . to be cocaine or heroin, but he could not locate any marijuana. Upon presenting the cocaine to the defendant, he advised the trooper where in the car the marijuana was located[.]

The judge found Nocito's testimony credible, and that "the facts he testified to were substantially corroborated by the dashboard videos[.]"

Judge Kelley reviewed various factors to be considered when deciding whether a defendant's consent to search was voluntary or coerced as set forth in State v. King, 44 N.J. 346, 352-53 (1965). Ultimately, the judge concluded:

[H]aving had the ability to observe the consent form being read to [defendant], the fact that the trooper in advising [defendant] of his rights to withdraw the consent-to-search, the demeanor of [defendant], the demeanor of the trooper in providing the rights, and the fact that back at the station [defendant] executed the search form, and the totality of the circumstances, this Court finds that the consent was voluntarily given[.]

II.

Defendant presents the following argument on appeal:

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS THE WARRANTLESS STOP AND SEARCH OF DEFENDANT'S VEHICLE.

The Supreme Court has explained the standard of review applicable to our consideration of a trial judge's fact-finding on a motion to suppress:

We are bound to uphold a trial court's factual findings in a motion to suppress provided those "findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243-44 (2007) (quoting State v. Elders, 386 N.J. Super. 208, 228 (App. Div. 2006)). Deference to those findings is particularly appropriate when the trial court has the "opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy."

Id. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Nevertheless, we are not required to accept findings that are "clearly mistaken" based on our independent review of the record. Ibid. Moreover, we need not defer "to a trial . . . court's interpretation of the law" because "[l]egal issues are reviewed de novo." State v. Vargas, 213 N.J. 301, 327 (2013).

[State v. Watts, 223 N.J. 503, 516 (2015) (alteration in original).]

An appellate court remains mindful not to "disturb the trial court's findings merely because 'it might have reached a different conclusion were it the trial tribunal' or because the 'trial court decided all evidence or inference conflicts in favor of one side' in a close case." Elders, supra, 192 N.J. at 244 (quoting Johnson, supra, 42 N.J. at 162). Rather, we reverse only when the court's findings "are so clearly mistaken 'that the interests of justice demand intervention and correction.'" Ibid. (quoting Johnson, supra, 42 N.J. at 162).

The stop of a motor vehicle is lawful if the authorities have a reasonable and articulable suspicion that violations of motor vehicle or other laws have been or are being committed. State v. Carty, 170 N.J. 632, 639-40, modified on other grounds, 174 N.J. 351 (2002). Here, the motion judge found there was reasonable and articulable suspicion that defendant committed a motor vehicle

violation. This provided the necessary legal basis for the stop. Defendant does not challenge this conclusion.

"[W]hen the reasonable inquiries by the officer related to the circumstances that justified the stop 'give rise to suspicions unrelated to the traffic offense, an officer may broaden [the] inquiry and satisfy those suspicions.'" State v. Baum, 199 N.J. 407, 424 (2009) (second alteration in original) (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)). In the present case, when Nocito approached the car, he immediately smelled the odor of raw marijuana. This observation led him to arrest defendant and request consent to search his vehicle.

Under the Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution, a warrantless search is presumed invalid, and places the burden on the State to prove that the search "'falls within one of the few well-delineated exceptions to the warrant requirement.'" State v. Pineiro, 181 N.J. 13, 19 (2004) (quoting State v. Maryland, 167 N.J. 471, 482 (2001)). Consent is a well-recognized exception to the Fourth Amendment's search warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854, 858 (1973). Furthermore, "consent searches are considered a 'legitimate aspect of effective police activity.'"

State v. Domicz, 188 N.J. 285, 305 (2006) (quoting Schneckloth, supra, 412 U.S. at 228, 93 S. Ct. at 2048, 36 L. Ed. 2d at 863).

"Consent may be obtained from the person whose property is to be searched, from a third party who possesses common authority over the property, or from a third party whom the police reasonably believe has authority to consent[.]" State v. Maristany, 133 N.J. 299, 305 (1993) (citations omitted). To be valid, a consent to search must be voluntary and knowing in nature. Schneckloth, supra, 412 U.S. at 222, 93 S. Ct. at 2045, 36 L. Ed. 2d at 860. In New Jersey, the person giving consent must first be advised of his right to refuse. State v. Johnson, 68 N.J. 349, 353-54 (1975).

In King, supra, 44 N.J. at 352-53, the Court identified certain factors to consider when deciding whether a defendant's consent was voluntary or coerced. It cautioned that "[e]very case necessarily depends upon its own facts" and "the existence or absence of one or more of the . . . factors is not determinative of the issue." Id. at 353. Moreover, the trial court "is in a better position to weigh the significance of the pertinent factors than is an appellate tribunal," by having "the advantage of seeing and hearing the witnesses [to] not only evaluate their credibility but also . . . gain a 'feel' of the case which the cold record denies to a reviewing court." Id. at 353-54.

Among the factors indicative of voluntariness are:

(1) that consent was given where the accused had reason to believe that the police would find no contraband[;] (2) that the defendant admitted his guilt before consent[;] (3) that the defendant affirmatively assisted the police officers[.]

[Id. at 353 (citations omitted).]

Factors tending to suggest a coerced consent are:

(1) that consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; (5) that consent was given while the defendant was handcuffed[.]

[Id. at 352-53 (citations omitted).]

Additionally, when police request consent to search during a motor vehicle stop, they must have a reasonable and articulable suspicion that the search will produce evidence of criminal wrongdoing. Carty, supra, 170 N.J. at 635; State v. Thomas, 392 N.J. Super. 169, 188 (App. Div.), certif. denied, 192 N.J. 597 (2007). That standard has been defined as "a particularized and objective basis for suspecting the person stopped of criminal activity[,]" and is a far lower standard than probable cause. State v. Stovall, 170 N.J. 346, 356 (2002) (quoting Ornelas v. United States, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661, 134 L. Ed. 2d 911, 918 (1996)). "[A] finding of reasonable and

articulable suspicion of ongoing criminality" is determined by objective "cumulative factors in a totality of the circumstances analysis[.]" Elders, supra, 192 N.J. at 250.

In summary, the consent exception to the warrant requirement, as applied to the search of a motor vehicle, has three prongs. The State must prove: 1) the police had a reasonable and articulable suspicion of criminal activity; 2) the consent was voluntary; and 3) the person who granted consent had the authority to do so.

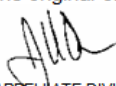
The first and third prongs were clearly established. Regarding the first prong, Trooper Nocito smelled the odor of raw marijuana emanating from defendant's vehicle. "'New Jersey courts have recognized that the smell of marijuana itself constitutes probable cause that a criminal offense ha[s] been committed and that additional contraband might be present.'" State v. Walker, 213 N.J. 281, 290 (2013) (alteration in original) (quoting State v. Nishina, 175 N.J. 502, 516-17 (2003)). As to the third prong, defendant was the driver and sole occupant of the vehicle, and does not challenge his authority to consent to its search.

Defendant's appeal thus focuses on the second prong. Specifically, he contends that the court did not properly analyze the King factors in determining that his consent was voluntarily given. We disagree. Although defendant denied guilt and consented to the search after being arrested and handcuffed, he also never

refused or withdrew his consent. He later signed the consent form, which further evidences that he was not coerced or threatened. See State v. Chapman, 332 N.J. Super. 452, 467 (App. Div. 2000). Having heard Nocito's testimony and viewed the dash cam video, Judge Kelley found that defendant assisted Nocito in locating the marijuana, and that Nocito advised him of his right to revoke his consent. The record supports the judge's conclusion that defendant's consent to search the vehicle was knowing and voluntary. We are satisfied that defendant's motion to suppress was properly denied.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION